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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. [redacted] 100

BERTRAM WILLIAMS, MAX BRASCH and HEINZ MOTTEK, suing on behalf of themselves and all other holders of Class B Debentures of Green Bay and Western Railroad Company,

Petitioners,

—v.—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

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OCTOBER TERM, 1914.

No. 1335.

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Petitioners,

—v.—

GREEN BAY AND WESTERN RAILROAD COMPANY,

Respondent.

PETITIONERS' REPLY BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

I.

RESPONDENT HAS ABANDONED ANY PRETENSE THAT WISCONSIN IS MORE CONVENIENT THAN NEW YORK FOR THE TRIAL OF THIS SUIT.

Respondent has evidently abandoned any claim that Wisconsin is more convenient than New York for its directors for the trial of this suit. It does not deny that the directors are not amenable to process in Wisconsin. Instead we find the amazing statement in respondent's brief at page 8 that "Whether or not respondent's directors are amenable to process in Wisconsin is in no wise relevant," because the directors have not been joined as defendants.

This statement must be considered in the light of respondent's construction of the debentures themselves, which construction would make distribution of the surplus earnings "analogous to dividends" and dependent upon the exercise of discretion by respondent's directors (Respondent's brief, pp. 9-10). Indeed, this construction was the basis of the holding in the court below that jurisdiction had been properly declined by the district court (R. 61).

Respondent is therefore in the awkward position of urging that this suit is not maintainable because the directors are necessary parties, while at the same time insisting that the suit must be brought in that jurisdiction only where the directors are not amenable to process. Such an absurd result completely negates the considerations of justice and efficiency which lie at the base of the doctrine of *forum non conveniens*, the doctrine which respondent has invoked to defeat the jurisdiction selected by the plaintiffs.

II.

THE COURTS BELOW HAVE NOT HELD THAT THE STATE COURT IN WISCONSIN HAS EXCLUSIVE JURISDICTION.

It appears to us that respondent's brief gives the impression, no doubt unintentionally, that the district court, in declining jurisdiction, ruled that the *state* court of Wisconsin should decide the issues. Neither the district court nor the circuit court so held, as reference to the opinions will show (R. 48-51; 58-62). The original dismissal and its affirmance in the court below was solely on the basis of the doctrine of *forum non conveniens*. It left the petitioners free to commence a suit in either the state courts of Wisconsin or the federal courts sitting in that district. The quotations from *Pennsylvania* v. *Williams*, 294 U. S. 176, appearing at pages 2 and 5 of respondent's brief, are therefore not in point. In that case a Pennsylvania corporation was involved and the federal district court sitting in Pennsylvania relinquished its jurisdiction in favor of the Pennsylvania

state court because of the special circumstances there present. The doctrine of that case is not to be extended (Cf. *Meredith* v. *Winter Haven*, 320 U. S. 228), and certainly has no application here.

The question here is not whether the federal court sitting in Wisconsin rather than the Wisconsin state court should decide the issues in this case, but whether any court, state or federal, in Wisconsin is necessarily a more appropriate forum than the federal district court sitting in New York.

III.

NO QUESTIONS OF PUBLIC POLICY ARE INVOLVED IN CONSTRUING THE CONTRACT IN SUIT.

Respondent cites the case of *New York, etc., Railroad* v. *Nickals*, 119 U. S. 296, in its brief at page 10 in support of its argument that petitioners' construction of the debentures would so impair the ability of the defendant railroad to maintain its road as to make the contract void as against public policy. The cited case is clearly distinguishable.

In the *Nickals* case, the plaintiffs, preferred stockholders, claimed that the application of net profits from operations towards providing additions and improvements to the railroad was "a violation of rights secured to preferred stockholders" under their contract (p. 302). The court held that such expenditures were necessary and made "in good faith" (p. 308). Notwithstanding such a finding, the lower court held that the preferred stockholders had an absolute right to receive annual dividends of 6% out of annual net earnings before deducting expenditures for improvements and additions. This interpretation of the contract was held by this Court to be "an erroneous interpretation of both the agreement and the company's charter" (p. 304). Buttressing its position, the Court went on to say that a different view would "lead to results which sound policy would seem to forbid" in that it would prevent the railroad from fulfilling its duty "to maintain its track and cars in such condition as to ac-

commodate the public and provide for the safe transportation of passengers and freight" (p. 306).

Reference to Exhibit "B" attached to the complaint (R. 11) shows that there is no such problem involved in the present case. Plaintiffs do not seek to avoid any expenditures made by the company for additions or improvements to the road. On the contrary, the right of the directors to exercise discretion in that respect and reasonably and in good faith to charge expenditures of this character against annual earnings is expressly recognized in Exhibit "B". Petitioners claim only such earnings as remain "after deducting reserves for additions, general improvements and depreciation" (R. 5), and thus any alleged violation of public policy in the *Nickals* case, *supra*, simply cannot exist here.

IV.

THE CASE OF THOMAS v. NEW YORK & GREENWOOD LAKE RY. CO. IS AUTHORITY FOR PETITIONER'S CONTENTIONS.

Respondent refers at page 9 of its brief to the case of *Thomas* v. *New York & Greenwood Lake Ry. Co.* (139 N. Y. 163), and states that the court there held "that the issue pertained to the discretion of the directors, an internal affair of the corporation." If this statement gives the impression that the complaint in that case was dismissed because the internal affairs of the corporation were involved, the quoted statement is misleading. That case involved a foreign railroad corporation. The New York court did not dismiss because internal affairs were involved. On the contrary, it considered at great length the provisions of the contract there sued upon by income bondholders, saying at page 180:

> "It remains to consider whether the complaint discloses any breach of the contract between the defendant corporation and the bondholders. Unless facts are stated showing that the contract has been violated by the corporation, there can be no ground for either legal or equitable relief. In ascertaining the meaning

> of the contract, the same rules of construction apply as in other cases. The words are to be interpreted according to their natural and legal import. No strained construction is to be placed upon them to meet a supposed hardship, or to relieve either party from a situation which, if it had been forseen, might have been provided for, but for which no provision was made."

The defendant in that case raised the point that, assuming the existence of earnings, plaintiffs could not recover because "it is by the contract a condition precedent to the right of the bondholders to maintain an action, that the board of directors should certify to the fact and the amount." As to this argument the New York Court of Appeals said at page 182:

> "The wrongful withholding of a certificate when demanded satisfies the condition precedent, and this is especially true where the alleged condition precedent is some act of the party who is liable to pay. In such case his wrongful inaction is no obstacle to a recovery."

The complaint was dismissed, however, because it was "fatally defective in that it does not show that there were earnings applicable to the payment of interest on the bonds, which had either been retained by the corporation or applied to other purposes" (p. 182).

CONCLUSION.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, August 23, 1945.

Respectfully submitted,

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